If I fail to tap the rubber, I have to either purchase same from the open market or pay him the full market price as on the expiration of four (4) months from the declaration of peace in Malaya."

It was also not disputed that the rubber was not delivered as agreed and that on demand being made by plaintiff for delivery defendant refused on the ground that the agreement was invalid.

The plaintiff does not possess and has never possessed a licence to purchase rubber as required by the Rubber Dealers Ordinance, Cap. 212.

The only question in this matter is whether the contract is enforceable. Mr. Ong Huck Lim for the defendant submitted that the contract was illegal and unenforceable because the plaintiff was not licensed to purchase rubber. Mr. Hogan for the plaintiff contended that the defendant refused to deliver the rubber without ascertaining whether the plaintiff would obtain a licence before delivery and that therefore the second part of the contract note — the payment of the full market price of the rubber — was enforceable.

Both counsel referred to the judgment in *Syn Thong & Co. v. Tong Jco (Hoo) & Co.*[1] supporting their respective arguments. That case laid down that a licence under the Rubber Dealers Ordinance, Cap. 212 for the purchase of rubber is necessary when the purchaser takes delivery but not before. It is clear then that the contract was not illegal when entered into and the only question is whether in the existing circumstances particularly as the plaintiff is not licensed to enable him to take delivery, this Court should order the contract to be carried into effect.

The contract is quite plainly a contract for the delivery of rubber with the alternative that in default of delivery damages are to be paid to the amount of the market price of the rubber. In my view the contract is indivisible and if enforced the order must be for the delivery of the rubber and in default of delivery payment of the damages agreed upon.

It is abundantly clear that the Court could not order the enforcement of a contract where the enforcement would contravene the criminal law. It is equally clear that the Court could not, as suggested by Mr. Hogan, merely make an order for payment of damages as this would be damnifying the defendant for not lending himself to the commission of a criminal offence.

The plaintiff is not licensed to take delivery of the rubber; for him to do so would infringe the criminal law. The plaintiff's claim must be rejected.

Action dismissed with costs.

Judgment for the defendant.

NG SEE HEM v. LIM AH HOOI

[Court of Appeal (Pretheroe, Ag. C.J., Thomson and Russell, JJ.) September 26, 1950]

[F.M. — Civil Appeal No. 12 of 1950]

Appeal — Appeal on question of fact — Credibility of witnesses — Whether plaintiff can call defendant as his own witness — Evidence Ordinance, 1950. s. 114.

This was a claim on a promissory note. The plaintiff (respondent) alleged that he handed $60,000 to the first defendant (appellant) for safe custody and that the two defendants signed the promissory note. The second defendant admitted the debt and judgment was obtained against him. The first defendant (appellant) denied that he had ever executed the promissory note and pleaded that the promissory note was a forgery. He also denied that the plaintiff (respondent) had ever handed him the sum of $60,000. When the case came on for trial, the second defendant was present in Court but was not called as a witness for either side. Judgment was given for the plaintiff (respondent) and the first defendant (appellant) appealed.

Held, (1) that the issue in this case was one of fact and as the learned trial Judge had based his decision on the opinion he formed as to the comparative reliability of the witnesses, the appellate Court could not interfere; (2) that although the plaintiff at the trial could have called the second defendant as his witness, his failure to do so could not raise any presumption under section 114 of the Evidence Ordinance, 1950, as the second defendant had admitted his joint liability.

Cases referred to:—

(1) *Watt (or Thomas) v. Thomas* (1947) 1 All E.R. 582 at page 583.

(2) *Price v. Manning* 42 Ch. D. 372.

CIVIL APPEAL.

E. D. Shearn (*M. S. Mahendran* with him) for the appellant.

S. M. Sharma for the respondent.

The facts and arguments sufficiently appear from the Judgment.

Cur. Adv. Vult.

Pretheroe, Ag. C.J. : — In this suit plaintiff alleged that he handed $60,000 to the first defendant for safe custody, as he was afraid that if the secret Ang Bin Hoay Society came to know he had this capital in hand it would have demanded a heavy contribution from him. He alleged that the defendants went to him together; that he had known the second defendant for ten years but did not know the relationship between the two defendants; that the two defendants signed the promissory note and that nobody else was present when the promissory note was signed. Second defendant admitted the debt and plaintiff obtained judgment against him. The first defendant, however, denied that he had ever executed the promissory note and, in his statement of defence, pleaded that the promissory note attached to the plaint "is a forgery". He also denied that the plaintiff had ever handed him the sum

of $60,000. When the case came on for trial, the second defendant was present in Court but was not called as a witness for either side.

There was only a single issue to be decided *viz.* was the promissory note genuine or a forgery? Each side called a number of witnesses but, as the plaintiff himself admitted, no person other than the parties to the suit was present when the promissory note was executed, the evidence was not of much assistance to the Court. Several admittedly genuine signatures of the first defendant were put in evidence. All those, as well as that on the promissory note, were in Chinese characters, and it is evident that his signatures are not uniform. Mr. Sharma, counsel for the plaintiff, alleged in his opening address that the defendant had "deliberately changed his signature when the case was pending." Exhibits produced by the registration clerk in the Land Office at Teluk Anson, however, rendered this allegation untenable, as authentic signatures made in the years 1935 and 1939 had similar variations to those made after the institution of this suit. The plaintiff called one witness as a handwriting expert. He was a Government pensioner, a Chinese, who had previously served for twenty-eight years as senior Chinese Translator in the Labour Office at Ipoh and who stated that he had frequently had to compare handwritings and signatures during his service. There is little doubt that this witness was entirely honest and trustworthy, but he fell into errors. For example he distinguished the signatures on Exhibits P. 8 and D. 4. Exhibit P. 8 was the promissory note in the case and Exhibit D. 4 was an undisputed signature made by the first defendant when registering a business name. On his side the first defendant called two so-called handwriting experts. One was the Manager of the Overseas Chinese Bank at Teluk Anson and the other was an Indian gentleman who had graduated from the International Criminalogical School, Washington, by way of a correspondence course. Both of these witnesses likewise made errors and rejected admittedly genuine signatures of the first defendant as forgeries. In this dilemma the learned trial Judge decided that he was unable to accept as experts any of the witnesses called as "handwriting experts". He made a long detailed examination of all the exhibits himself, but in the end based his decision chiefly on the credibility of the witnesses as seen and heard by himself. He came to the conclusion that although "the plaintiff's story is an unusual one" which "in normal times would be rejected out of hand", yet he believed the plaintiff's witnesses rather than the defendant's. He therefore, gave judgment for the plaintiff in the sum claimed, and from that decision the first defendant appealed to this Court.

The petition of appeal contained no less than thirty-two paragraphs and sub-paragraphs. Most of them were solely concerned with questions of fact, and when arguing the appeal Mr. Shearn did not deal with them separately. He admitted frankly that a heavy burden rested upon him when seeking to reverse the original decision on questions of fact. He submitted, however, that, even on questions of fact, a trial Judge must not be regarded as infallible. He cited the following opinion of Viscount Simon in *Watt (or Thomas) v. Thomas*[1] :—

"Before entering on an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on fact from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (e.g. on a Case Stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusions originally reached on that evidence should stand, but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is clearly a question of law), the appellate court will not hesitate so to decide, but if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge for first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and of observing the manner in which their evidence is given. What I have just said reproduces in effect the view previously expressed in this House, e.g. by Viscount Sankey in **Powell and Wife v. Stratham Manor Nursing Home,** ((1935) A.C. 250), and in earlier cases there quoted."

Next Mr. Shearn referred to the opinion of Lord Thankerton given in *Watt v. Thomas.* The noble Lord set out the principles adopted by the House of Lords when considering appeals based on questions of fact. He said :—

"I do not find it necessary to review the many decisions of this House, for it seems to me that the principle embodied therein is a simple one, and may be stated thus:—

1. Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is certified that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusions,

2. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.

3. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

Mr. Shearn then added that he based his submissions on Lord Thankerton's third paragraph. He submitted the judgment of the learned trial Judge to a detailed and critical scrutiny but in my opinion Lord Thankerton's second paragraph is the one applicable to this appeal. The oral evidence in the case is completely contradictory; the exhibits completely baffled three so-called experts; and we did not find it possible, after long and careful comparison with other signatures, to pronounce definitely either that the promissory note was a forgery or that it was genuine. The learned trial Judge stated that the main reason for his decision was the opinion he had formed of comparative reliability of the witnesses. This is an advantage not possessed by this Court and in the circumstances I am of the opinion that this Court is "not in a position to come to any satisfactory conclusion" on the written evidence.

There remains one other point. It has already been stated that the second defendant was in Court during the hearing but was not called as a witness. Mr. Shearn submitted that under section 114 of the Evidence Ordinance, 1950, the trial Judge should have presumed that his evidence would have been unfavourable to the plaintiff. At first I entertained some doubt as to whether the plaintiff could call a defendant as his own witness, but this doubt was unfounded (*Price v. Manning*[2]). However, the facts of this case rebut any such presumption, as the second defendant had already admitted his joint liability to pay the plaintiff $60,000.

In my opinion this appeal fails and should be dismissed. The respondent should have his costs, and the sum of $500 deposited in Court should be paid out to respondent against his costs.

Thomson, J. : — I have had the advantage of reading the judgment of the Acting Chief Justice with which I agree. I do not wish to add anything.

Russell, J. : — I have had the advantage of reading the judgment of the Acting Chief Justice with which I agree. I do not wish to add anything.

Appeal dismissed.

MURUGIAH v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Thomson, J.) October 5, 1950]

[Ipoh — Criminal Appeal No. 66 of 1950]

Penal Code, s. 161 — Accused charged with three charges of receiving illegal gratification — Defence not called on one charge — Effect of acquittal on this charge on the trial of the other charges.

In this case the appellant was originally charged on three charges of taking gratification as a public servant in contravention of section 161 of the Penal Code. The first of these charges was dismissed and the case proceeded on the remaining two charges. At the end of the prosecution case, the learned President of the Sessions Court found that the appellant had no case to answer on the second charge and the appellant was acquitted on this charge. He also ordered that there was a case to answer on the third charge. The appellant thereupon proceeded with his defence and he was convicted and sentenced upon that charge. In his grounds of judgment, the learned President stated (inter alia) that he found as a fact that Lee Koi, that is the person concerned in the second charge, did give money to the appellant and this was one of the grounds on which he refused to accept the appellant's explanation in his defence.

Held, that as the appellant had been acquitted on the second charge, the learned President should have accepted this as establishing the innocence of the appellant on that charge and that he had misdirected himself in taking into consideration the evidence on the second charge and in relying on it in coming to his decision.

Cases referred to :—

(1) *Rex v. Plummer* (1902) 2 K.B. 339 at page 349.
(2) *Brannan v. Peek* (1947) 2 All E.R. 572.
(3) *Teja Singh and Mohamed Nasir v. Public Prosecutor* (1950) M.L.J. 71; 1 M.L.R. 26.

CRIMINAL APPEAL from the Sessions Court, Ipoh.

B. J. P. Joaquim (*M. N. Cumarasami* with him) for the appellant.

E. N. Griffith-Jones for the respondent.

The facts sufficiently appear from the Judgment.

Cur. Adv. Vult.

Thomson, J. : — This appellant was convicted in the Sessions Court at Ipoh on a charge of taking gratifications as a public servant in contravention of section 161 of the Penal Code. He was sentenced to six months' simple imprisonment and a fine of $1,500 or nine months' simple imprisonment in default of payment. Against that conviction and sentence he has now appealed.

A large number of grounds of appeal were argued with great force and persuasiveness by Mr. Joaquim, and I trust I shall not be regarded as lacking in appreciation of the assistance I have derived from Mr. Joaquim's argument if in view of certain conclusions at which I have arrived I do not deal in detail with all the grounds argued by him.